

IN THE MATTER OF THE ARBITRATION BETWEEN

FMCS No. 050819-58473-7

Grievant: James Slan

Jefferson Partners, Inc.

Before James S. Margolin Arbitrator
Date Of Hearing October 4, 2005

and

APPEARENCES:

ATU, Local 1498

Scott Allan, Esq.
Employers Association
for the Company

Weston R. Moore, Esq.
for the Union

OPINION AND AWARD

THE GRIEVANCE

The subject grievance was filed on November 14, 2004, and stated in part as follows:

“This matter concerns a [sic] alleged incident of misconduct at the Holiday Inn in Ft. Smith AR on October 19, 2004, while off duty.”

...“At no time did [I] conduct my self [sic] in an unprofessional manner. I did not use profanities, raise my voice, or act intimidating or in a threatening manner.”

RELEVANT WORK RULES

Pertinent Language Of

THE EMPLOYERS THE SAFETY AND GENERAL RULES MANUAL

“PERSONAL CONDUCT

“Professional Conduct is required of a driver in his contacts with regulatory and enforcement authorities, the public and his fellow employees.

Words or acts to the Company, or words or acts which result in damage to the Company's *reputation*, property or services, are cause for disciplinary action. ..."[*emphasis added*]

Pertinent Language Of The Collective Bargaining Agreement

"30.16 ROOM EXPENSE

"Whenever it is necessary for an employee to receive rest at an away-from-home point..., the Company shall provide, without cost to the Employee, a clean comfortable room..."

STATEMENT OF FACTS AND BACKGROUND

Jefferson Lines Bus Company provides passenger bus service across several states, including Minnesota, Iowa, Missouri, Kansas, Oklahoma and Arkansas. The Company's corporate headquarters is located in Minneapolis, Minnesota. This case arises out of a grievance filed by Mr. James Slan, a three-year bus driver employee of Jefferson Lines. The Union alleges that the Grievant was terminated without just cause, and the Company alleges that the Grievant was fired for just cause for violating the company's personal conduct policy. The Company alleges that the discharge was based on a history of alleged inappropriate behavior, the last and final of which was an off-duty incident that occurred at a hotel in Ft. Smith, Arkansas. Hearing was held in Kansas City, Missouri on October 4, 2005. During the course of the hearing both parties were afforded full opportunity for the presentation of evidence, examination and cross-examination of witnesses, except as will be addressed *infra*. The parties elected to file post-hearing briefs. The Arbitrator received timely postmarked briefs from both parties. The parties stipulated that the grievance and arbitration were properly before the Arbitrator, provided that the Company asked the Arbitrator to determine the arbitrability of the matter. The parties were

unable to stipulate to the issue to be decided by the Arbitrator, and agreed that the Arbitrator could determine the arbitrability and the issue to be resolved after receiving the evidence and arguments.

Analysis of the evidence indicates the following. The Grievant was employed by the Company as a bus driver on October 19, 2004. The Grievant had served in that position for three years and, prior to that date.” On October 19, 2004, The Grievant drove a Company bus, with passengers, from Kansas City to Ft. Smith, Arkansas. Upon arrival in Ft. Smith he phoned the local Holiday Inn hotel, with which the Company contracts to provide lodging for Company drivers in Ft. Smith, to provide transportation for him from the bus terminal to the hotel. The Grievant arrived at the hotel without incident. The desk clerk assigned him a room and provided him a key card. The key card would not open the door to the room.

The Grievant returned to the front desk and was given a replacement key card. This key card also would not open the door, so he again returned to the front desk. The desk clerk told the Grievant that she had mistakenly assigned him to an already occupied room, and that she would assign him a room on the ninth floor, which he knew to be only smoking rooms. The Grievant objected to a smoking floor room, and was then told that the only other available room was one equipped for those guests with handicaps. The Grievant had occupied this room on prior visits and knew it to have fixtures and modifications which made him uncomfortable. The Grievant complained to the clerk that he did not want to be assigned to this room. At this point, there was some contentious discussion between the clerk and the Grievant concerning the clerk’s inability to remedy the situation.

The Grievant informed the on-duty Company dispatcher of the situation. The Grievant was told by this supervisor to move to another hotel, however the supervisor could not assure the

Grievant that he would be reimbursed for this additional expense. Instead, the supervisor directed the Grievant to phone and speak to a second supervisor at 7:00 a.m. Instead, the Grievant returned to the front desk and informed the clerk that he would accept the “handicapped room.”

There was conversation between the Grievant and the desk clerk, at some point during the “check-in” process, concerning the Grievant’s desire to move to an alternate hotel and his insistence that Holiday Inn should be responsible for any additional expense caused by his move, which was refused. The Grievant also complained to the clerk that he had encountered this problem at Holiday Inn on more than one prior occasion and suspected that the situation was not accidental or inadvertent but, rather, intentional and discriminatorily motivated. He also uttered an exclamation, in a volume that was heard by the clerk, that he was “sick of this s***.” Nothing further of note happened during his stay or during his return to duty.

The Grievant continued to perform his duties as a bus driver after October 19, 2004. He subsequently completed his route to Ft. Smith, Arkansas on two more occasions, stayed at the same Holiday Inn on two subsequent occasions and interacted with the employees of Holiday Inn, as necessary without incident. No complaints were received concerning the Grievant’s behavior or his job performance during this subsequent period.

On October 27, 2005, Mr. Wally Romashko, then the company’s Operations Manager, contacted Grievant concerning a nonspecific allegation of wrongdoing at the Holiday Inn Ft. Smith. Mr. Romashko, without providing any detailed explanation to the Grievant, began questioning him only generally about his conduct in Ft. Smith. Mr. Romashko never informed the Grievant why he was being questioned or what allegations, if any, had been made. Mr. Romashko said, instead, “I understand you had some difficulty at the Ft. Smith Hotel, you want

to tell me something about that?” Then, when The Grievant answered that “they tried to put [him] into a room . . . that was occupied”, “. . . a smoking room” and “. . . a handicapped room”, Mr. Romashko responded only to say, “Well, I guess needless to say the manager out there, their version of things, ah, much more explicit, descriptive.” Mr. Romashko then asked the Grievant if he had “anything else” that he wanted to add “about what happened there.” The Grievant stated that he would “probably need to get the Union involved” if disciplinary action might result. Mr. Romashko never told the Grievant that any discipline could result from his inquiry, but thereupon informed the Grievant that he was suspended and removed from service. The Grievant was also ordered to refrain from contacting the Holiday Inn, potential witnesses or otherwise gathering information and evidence concerning the alleged incident, and he was ordered not to contact or allow his attorney to contact any witnesses.

The Grievant received a letter dated October 28, 2004 from the Company signed by Mr. Romashko that stated, in part, that the purpose of the letter was to document that Mr. Romashko “suspended” the Grievant on October 27, 2004, “pending investigation into an incident at the Holiday Inn earlier this week.”

The Ft. Smith incident was investigated by Ms. Lisa Stock, an employee of the Employers Association, who was hired as a consultant by Jefferson Lines to perform human resources duties such as investigation of alleged employee misconduct. Ms. Stock’s investigation consisted of telephone conversations with Mr. Michael Rose, the General Manager of the Holiday Inn, Ms. Gail Gilgore, the Guest Services Manager at the hotel, and reviewing written statements that the Managers received from the front desk employees. Ms. Gilgore did not allow Ms. Stock to interview the front desk employees. Ms. Stock did not attempt to

interview the Grievant or contact any Union representative. Neither Mr. Rose nor Ms. Gilgore witnessed the incident.

Ms. Stock concluded that the Grievant used profanity with the front desk staff, threw his keys on the counter, raised his voice, and according to the staff, was “very loud, rude, and scary. Mr. Rose also sent an e-mail to Ms. Stock indicating that the Grievant was no longer welcome at the hotel. As a result of Ms. Stock’s findings, by letter dated November 2, 2004 and delivered to the Grievant on November 12, 2004, the Grievant’s employment was terminated.

UNION POSITION

The Union urges that the grievance was timely, that the Company failed to satisfy its burden to prove that the Grievant was discharged for just cause, it’s failure to follow the procedural requirements in the collective bargaining agreement prior to administering discipline, denied the Grievant due process and therefore nullified the discipline, and that he therefore should be reinstated.

COMPANY POSITION

The Company believes that it had just cause to terminate the Grievant, that he had a long history of inappropriate behavior, that he had received numerous warnings including a final warning, and that it had thoroughly investigated the Ft. Smith incident justifying termination.

ISSUE

Was the Grievant disciplined for just cause and what is the appropriate remedy?

ANALYSIS

The Company states in its post-hearing brief that “The issue [to be decided] is was the grievant disciplined for just cause? If so, what is the appropriate remedy?” This is the same

issue also proffered in so many words by the Union in its post-hearing brief. Therefore, the Arbitrator will only consider the just cause issue and assume the Company now has conceded the arbitrability of the grievance.

The Employer has failed to satisfy its burden of proving that it terminated the employment of the Grievant for just cause. "Just cause" consists of a number of substantive and procedural elements. Primary among its substantive elements is the existence of sufficient proof that the employee engaged in the conduct for which he or she was discharged or disciplined. Other elements include a requirement that an employee know or reasonably be expected to know ahead of time that engaging in a particular type of behavior will likely result in discipline or discharge, the existence of a reasonable relationship between an employee's misconduct and the punishment imposed and a requirement that discipline be administered even-handedly, that is, that similarly situated employees be treated similarly, and disparate treatment be avoided.

Clearly, this is a discipline and discharge case, and it is well established in discipline and discharge cases that the Company bears the burden of proof in discharge cases. The glaring issue in this case is whether the Grievant was afforded substantive and procedural due process by the company in its decision to suspend, terminate the Grievant and justify its decision at hearing by hearsay evidence twice removed. One important consideration should be whether there is a company policy that clearly defines and puts an employee on fair notice of prohibited conduct. Additionally, whether it was a past practice of the Company of disciplining employees for disputes with persons other than Company employees and customers. There is nothing in the record on either of those points. A further consideration is an "...attempt to balance the interests between the parties. They [arbitrators] consider the right of the employee to his job to be of considerable importance and will overcome it only where the employer has suffered some detriment." *Gardner-Denver Co.*, 65 LA 82, at 87 (Wheeler, 1991). *Bracketing added.*

Similar to the analysis of this case is the case of *Worldwide Flight Services, Inc and TWU, Local 504*, FMCS 05-52928-3. 33LAIS 259, Smith, 1995, where the arbitrator found that due process violations nullified two Grievant's' terminations based on a customer complaint. The employees worked under a contract the company had with United Parcel Service (UPS), and

were discharged after UPS complained to the company about their performance and attitudes, and that they were no longer welcome at UPS. The arbitrator ruled that the terminations were not justified because the only evidence by the company in support of its decisions were two emails from UPS complaining about the grievants' performance. The arbitrator held that the grievants were entitled to cross examine their accuser to test the truthfulness of the charges, and concluded that the employer failed to prove the grievants committed the offenses alleged by UPS [since there were no other contract jobs to which the grievants could be reassigned, the union did not seek nor did the arbitrator award reinstatement].

The basic due process rights to which an employee who is accused of misconduct include the right to be informed of the charges, the right to confront accusers, the right to answer charges and the right to counsel or union representation. None of those rights seem to have been afforded to the Grievant in this case. Mr. Romashko not only failed initially to inform the Grievant of the complaints of the hotel or that it could lead to discipline, but he actually sandbagged him to discuss the incident without representation, and then forbade him and his attorney---the equivalent of the Union---from contacting the hotel to inquire on his own behalf. The latter appears to have been in retaliation for requesting Union representation.

Similarly, the investigation by Ms. Stock was fatally flawed because she not only never contacted the Grievant in her investigation concerning either specific allegations of the hotel employees, but she also failed to make inquiry into Grievant's allegation of discrimination. Similarly, Mr. Romashko failed to make such inquiry or seek the Grievant's response to Ms. Stock's conclusions. Undeniably, Ms. Stock's investigation was severely handicapped by her inability to interview the front desk staff personally, but basing her conclusions on hearsay information, failing to present those individuals at hearing, and presenting their statements in pure hearsay format is a fundamental failure of the Company to provide the Grievant procedural due process.

The Arbitrator is concerned about wording heretofore quoted from the Safety And General Rules Manual of Company. The provision upon which the Company relies in

discharging Grievant requires “professional conduct” of the Grievant in his contacts with the public, or acts which result in damage to the Company’s reputation with its customers or the Holiday Inn. Since the Grievant is a professional bus driver charged with the responsibility of passenger-customers, without clear definition it is reasonable to assume that “professional conduct” applies only to his driving duties and interaction with customers. Also, it seems unreasonable to consider the Grievant a professional hotel guest. There is no evidence in this case that the Grievant acted unprofessionally in his driving duties, or caused any damage whatsoever to the Company’s reputation. The Company argues in its post-hearing brief that, “The fact that this involved off duty conduct does not change the outcome. The Grievant’s misconduct made the grievant unable to perform his job, because he could not stay at the hotel and he could not be trusted to behave appropriately with the hotel staff. The misconduct resulted in the hotel refusing to work with him. The misconduct tarnished the employer’s reputation.” The Arbitrator disagrees with this argument for several reasons, the first of which his job was not staying at hotels but rather driving a bus. Second, the Grievant was off duty at the time of the subject incident, and there is no provision in either the collective bargaining agreement nor the work rules that specifically address off-duty conduct with non-customers, as is the Holiday Inn. Third, although the Grievant was banned from that Holiday Inn, there was no evidence that the Company’s reputation was injured and, in fact, the hotel manager praised the Company and the Holiday Inn relationship with the Company. Fourth, among the fifteen definitions in Article 2 of the Collective Bargaining Agreement, there are no definitions of “professional conduct” or “acts which damage the reputation of the Company.” While it is reasonable to assume that the public referred to are the Company’s customers, and possibly those who might witness offensive acts towards customers, beyond that is mere speculation and unfair notice to the employee.

Certainly, common sense can be imputed under certain circumstances. In this case, though, the Holiday Inn cannot reasonably be considered a customer of the Company, and the evidence is clear that the Company's reputation with Holiday Inn has not been harmed. The connection between the off duty misconduct and the injurious effect on the business must be reasonable and discernable and not merely speculative. **Elkori & Elkori, How Arbitration Works, 4th Ed., p. 939.**

In *Interurban Transit Partnership and ATU Local 836*, 33LAIS 116 (2004), the grievant, a public transport operator, generated customer complaints. The employer transferred the employee from his route and issued a written warning for violating rules governing courteous service to customers. As in that case, it appears to this Arbitrator in that transferring the Grievant to another route, or allowing the Grievant to stay at another hotel in Ft. Smith, would have been a more reasonable solution, and not an undue hardship on the Company.

The totality of the circumstances, and the credibility of the witnesses, are paramount factors to weighed by the Arbitrator. Included in this Arbitrator's analysis are the demeanor of the witnesses, perceived bias, personal or business interest or motive, contradictions to the witness's testimony, capacity to recall events and opportunity to perceive events. These factors bear directly on the credibility of a witness in evaluating the testimony and then allocating the proper weight to the testimony.

"The self interest of a witness is the greatest for those who stand to gain or lose from the decision of the Arbitrator. Obviously, the Grievant's job is at stake. However, his supervisors are equally interested since their reputation and judgment is subject to approval or disapproval. The Arbitrator must carefully consider all the circumstances that would tend to create bias on the part of any witness, and weigh such testimony with what other witnesses stated. When choosing between conflicting testimony, the version of events that is most reasonable, and corroborated by other witnesses, is the most credible." *Aramark Corp. and Retail, Wholesale And Department Store Union Local 1064*, 30 LAIS 1001 (Allen, 2002).

It is obvious to the Arbitrator that the Grievant's handling of the situation in Ft. Smith was contentious and did in fact cause the Company genuine embarrassment by arguing with the hotel clerk, uttering a profanity, and unreasonably insisting that Holiday Inn pay him directly for their "mistake". Although the Company was obligated under Article 30.16 to provide the Grievant a "clean, comfortable room", any dispute as to who should pay for lodging at another hotel should have been addressed to the Company and not the hotel clerk. In addition, the Arbitrator has concerns about the credibility of parts of the Grievant's testimony, for instance his admitted use of profanity, and earlier denial of such to the Company. While the Grievant is entitled to the benefit of the doubt about the exact nature of prohibited behavior, conversely the Company is entitled to the same benefit in believing that Grievant should not be unjustly rewarded for his questionable behavior.

AWARD

For the foregoing reasons, the grievance is sustained. The Employer is hereby ordered to reinstate the Grievant to his former position and seniority, with no retroactive pay or retroactive benefits.

IT IS SO ORDERED THIS 16TH DAY OF March, 2006, by



JAMES S. MARGOLIN, ARBITRATOR